(1) Supreme Court, U.S.
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No. 00-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

FELICIA ANDERSON, as Special Administrator
of the Estate of WAYNE ANDERSON, *Deceased*

Petitioner,

v.

KEVIN SIMON,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a prosecutor entitled to absolute immunity when he delays a judicial determination of probable cause to permit the police to gather additional evidence to justify an arrest?

2. Is the fact pleading standard that the Seventh Circuit applies to civil rights cases contrary to the notice pleading standard of Rule 8 of the Federal Rules of Civil Procedure?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 21, 2000.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-9) is reported at 217 F.3d 472. The opinion of the district court (App. 12-13) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 10) was entered on June 21, 2000. Rehearing was denied on July 20, 2000. (App. 11.)

RULE INVOLVED

This case involves Rule 8(a)(2) of the Federal Rules of Civil Procedure which provides as follows:

> (a) A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain
>
> * * *
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief
>
> * * *

STATEMENT

Chicago police officers arrested Wayne Anderson, petitioner's decedent, at about 3:40 p.m. on March 12, 1997 in connection with the burglary of his neighbor's apartment. (App. 1.) The neighbor identified the stolen items, Anderson confessed to the crime, and the neighbor signed a criminal complaint. (App. 1-2.)

Because the criminal complaint charged a felony offense, local procedure required that the complaint be approved by a prosecutor. Respondent was the prosecutor assigned to these "felony review" duties on March 12, 1997. (App. 2.)

Respondent reviewed the evidence and told the police that he would not approve charges until petitioner's decedent had been exhibited in a lineup where he could be viewed by employees of the pawn shop from which the stolen items had been recovered. (Id.) The detective assigned to the case objected to respondent's instruction to gather additional evidence, but respondent's wishes prevailed. (Id.)

In order to hold the lineup, petitioner's decedent was held overnight in the police lockup until about 5:00 p.m. the next day, when he was exhibited in a lineup. (Id.) After the lineup, petitioner's decedent was returned to the lockup, where he was found dead in his cell at about 7:20 p.m. (Id.)

Petitioner, as representative of the estate of Wayne Anderson, filed this action in the district court contending that respondent, acting under color of state law, had caused petitioner's decedent to be subjected to unreasonable post-arrest detention and thereby deprived of rights secured by the Fourth and Fourteenth Amendments. Respondent replied to the complaint with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted the motion and the Seventh Circuit affirmed.

In the view of the court of appeals, respondent's "decision not to approve charges against Wayne Anderson was entitled to absolute prosecutorial immunity."

(App. 4.) The court of appeals declined to credit petitioner's claim that respondent had ordered the police to keep petitioner's decedent in custody until a lineup could be held because petitioner had failed to allege "that the police were under any duty to follow a state's attorney's orders or suggestions." (App. 8.) In the view of the Seventh Circuit, petitioner was required to "allege reasons that Simon's statements caused police to hold Wayne Anderson in an unreasonable fashion." (Id.) The court of appeals stated that petitioner was also required to "set forth in her complaint how Simon's orders forced police to detain Anderson." (Id.)

In a timely petition for rehearing, petitioner argued that the panel's demand for additional factual allegations was contrary to the notice pleading standard of Rule 8(a)(2) of the Federal Rules of Civil Procedure. The court of appeals denied rehearing without opinion.

REASONS FOR GRANTING THE WRIT

-I-

The Seventh Circuit in this case afforded absolute immunity to a prosecutor who delayed the judicial determination of probable cause required by the Fourth Amendment. This unwarranted expansion of absolute immunity should be reviewed by this Court.

In *Gerstein v. Pugh*, 420 U.S. 103 (1975) the Court held that a warrantless arrest must be followed by a "judicial determination of probable cause." 420 U.S. 114. Thereafter, in *City of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court considered the duration of post-arrest detention and held that a jurisdiction which provides for a judicial determination of probable cause within 48 hours of arrest "will be immune from

systemic challenge." Id. at 56. The Court made plain, however, that it was not granting a blank check for 48 hours of post-arrest detention, noting that a shorter delay "may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." The Court provided several examples of unreasonable delay, including "delays for the purpose of gathering additional evidence to justify the arrest." Id.

The prosecutor's actions in this case postponed the judicial determination of probable cause to gather additional evidence to justify the arrest and deprived petitioner's decedent of the assistance of counsel at a lineup held after the filing of charges. *United States v. Wade,* 388 U.S. 218 (1963); *Kirby v. Illinois,* 406 U.S. 682 (1972).

The extension of absolute immunity to a prosecutor who delays the judicial determination of probable cause, and who deprives an arrestee of the assistance of counsel at a post-arrest lineup, is seemingly at odds with *Kalina v. Fletcher,* 522 U.S. 118 (1997), where the Court held that prosecutors were entitled to absolute immunity only while serving as an advocate in legal proceedings. Id. at 125. Under *Kalina,* "[t]he critical question . . . is whether [respondent] was acting as an [investigator] rather than as a lawyer" when he ordered that a lineup be held.

A suit for damages is the only effective remedy when a prosecutor delays the judicial determination of probable cause to gather additional evidence to justify the arrest. Certiorari should be granted to determine if this remedy is foreclosed by absolute immunity.

-II-

The pleading standard applied by the Seventh Circuit in this and other civil rights cases is contrary to the decisions of this Court in *Gomez v. Toledo,* 446 U.S. 635, 639-40 (1980), *Leatherman v. Tarrant County,* 507 U.S. 163, 164-69 (1993), and *Crawford-El v. Britton,* 523 U.S. 574, 594 (1998).

In the Seventh Circuit, a civil rights complaint "must allege facts bearing on all material elements necessary to sustain a recovery under some viable legal theory." *Looper Maintenance Service Inc. v. City of Indianapolis,* 197 F.3d 908 (7th Cir. 1999), For example, in First Amendment retaliation cases, the Seventh Circuit routinely upholds Rule 12(b)(6) dismissals if the plaintiff has not specifically alleged facts showing bad faith, bias, or retaliation.[1]

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1. The rule was established in *Gustafson v. Jones,* 117 F.3d 1015, 1018 (7th Cir. 1997) ("In order to establish a First Amendment retaliation claim, the facts alleged in the complaint must show that (1) the speech in which the plaintiffs engaged was constitutionally protected under the circumstances, and (2) the defendants retaliated against them because of it"), was reaffirmed by a divided panel in *Kyle v. Morton High School,* 144 F.3d 448 (7th Cir. 1998) and by unanimous panels in *Martinez v. Hooper,* 148 F.3d 856, 859 (7th Cir. 1998) ("a public employee . . . should be required to allege facts that could support a finding that the speech is on a matter of public concern'" (citation omitted)) and more recently in *Crenshaw v. Supreme Court of Indiana,* 170 F.3d 725, 729 (7th Cir. 1999) ("In order to establish her entitlement to the bad faith exception to the *Younger* doctrine, Ms.

The Seventh Circuit explained its pleading standard in *Ryan v. Mary Immaculate Queen Center,* 188 F.3d 857 (7th Cir. 1999) as "allow[ing] the court to determine at the outset of the litigation, before costly discovery is undertaken, whether the plaintiff has any tenable theory or basis of suit, so that if he does not the case can be got rid of immediately without clogging the court's docket and imposing needless expense on the defendant." Id. at 860.

The fact pleading standard applied by the Seventh Circuit is contrary to the notice pleading standard of Rule 8(a)(2). The Court has repeatedly stated that the "short and plain statement of the claim" in Rule 8 "meant what is said." *Conley v. Gibson,* 355 U.S. 41, 47 (1957); *Leatherman v. Tarrant County,* 507 U.S. 163, 168 (1993). There is no place in Rule 8 for the requirement applied by the Seventh Circuit in this case that a civil rights plaintiff allege "that the police were under any duty to follow a state's attorney's orders or suggestions," (App. 8), or "allege reasons that Simon's statements caused police to hold Wayne Anderson in an unreasonable fashion," (id.), or "set forth in her complaint how Simon's orders forced police to detain Anderson." (Id.)

Crenshaw must allege specific facts to support her inferences of bad faith, bias, and retaliation.")

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

October, 2000

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-4057

FELICIA ANDERSON, as Special Administrator
of the Estate of WAYNE ANDERSON, *Deceased*

Plaintiff-Appellant,

v.

KEVIN SIMON,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 1587 **James B. Moran,** *Judge.*

Argued May 17, 2000—Decided June 21, 2000

Before BAUER, COFFEY, and KANNE, Circuit Judges.

KANNE, Circuit Judge.

Wayne Anderson was a heroin addict with prior convictions for residential burglary. In March 1997, he burgled a neighbor's apartment and sold the stolen goods to a pawn shop to get money and buy heroin. The neighbor reported the burglary, and the police quickly located the stolen goods. On March 12, 1997, the police confronted Wayne Anderson with the stolen goods, and he immediately confessed to the burglary.

Anderson was arrested at 3:40 p.m. and taken to the 25th District Police Station in Chicago, where he was held in police lockup pending charging. Later that afternoon, his neighbor filed a criminal complaint, and the

police decided to hold Anderson overnight. During the night, Anderson began to experience heroin withdrawal symptoms. He became depressed and told the officers on duty that he wanted to kill himself. Shortly after midnight, the police watch commander assigned Detective Holec the case. Holec was responsible for working with Assistant State's Attorney Kevin Simon from the Felony Review Unit of the Cook County State's Attorney's office to determine whether Anderson would be charged with felony burglary.

Simon refused to approve felony charges against Anderson until a lineup could be held. Holec reported Simon's decision to Assistant Deputy Superintendent Anthony Ivanjack, his superior, and Ivanjack spoke to Simon about the matter at 3:00 a.m. Simon again refused to authorize felony charges against Anderson, and Ivanjack declined to transfer Anderson to a hospital prior to charging. Simon allegedly suggested to Ivanjack that the police set up a lineup and ordered Anderson detained until this lineup was held. For this reason, Anderson was held overnight and for much of the next day. The lineup was held at about 5:00 p.m. the next afternoon, and Anderson returned from the lineup at about 7:00 p.m. At 7:20 p.m., Anderson was found dead in his cell, hanging from a noose.

Felicia Anderson, Wayne Anderson's widow, filed suit against Ivanjack, the City of Chicago and the officers who monitored Wayne Anderson, claiming that the failure to transfer Wayne Anderson constituted a violation of his Fourth Amendment rights, pursuant to 42 U.S.C. sec. 1983. The City, the officers and Ivanjack eventually settled with Felicia Anderson. Unsatisfied with this resolution, in March 1999, Felicia Anderson filed a sec. 1983 action against Simon in his personal

capacity. Felicia Anderson stated in her complaint:

> 5. After [Wayne Anderson] had confessed and after a criminal complaint had been signed, defendant Simon, acting under color of his authority as an Assistant State's Attorney, caused [Wayne Anderson] to be held in custody at a police station so that additional evidence could be gathered against him.
>
> * * *
>
> 7. As the direct and proximate result of the above referred actions of [Simon], [Wayne Anderson] was deprived of rights secured by the Fourth and Fourteenth Amendment to the Constitution of the United States.

On July 14, 1999, Simon moved to dismiss the complaint, claiming that it was too vague, failed to state a claim and failed to allege the requisite causal relationship between Simon's role and Anderson's death. Simon also claimed that he was entitled to absolute prosecutorial immunity. In her answer to Simon's motion to dismiss, Felicia Anderson expanded the factual basis for her complaint, contending that Simon was empowered to order the police to hold Wayne Anderson until further evidence could be gathered and his decision to hold Wayne Anderson violated Wayne Anderson's Fourth Amendment rights, which led to the wrongful failure to prevent his suicide in violation of his Fourteenth Amendment right to due process.

However, on November 1, 1999, the district court granted Simon's motion to dismiss for three reasons. First, the court held that Simon was entitled to absolute immunity as a prosecutor. Second, the court held that

the failure of jailors to prevent a known suicide risk was a superseding cause that absolved Simon. Finally, because Anderson had not been held for forty-eight hours and Felicia Anderson had not pleaded sufficient complicating circumstances, the court held that she had failed to plead a violation of Wayne Anderson's constitutional rights, as required under sec. 1983.

On appeal, Felicia Anderson argues that the district court erred in dismissing her sec. 1983 complaint for three reasons: (1) Simon was not entitled to prosecutorial immunity because his refusal to charge was not a prosecutorial decision; (2) the court misapplied the forty-eight-hour rule because Wayne Anderson was detained without being charged only to allow police to gather additional evidence against him; and (3) the possibility of a superseding cause for Wayne Anderson's suicide, in this case jailor negligence, did not deprive Felicia Anderson of the right to seek damages for Simon's role in the detention. Because we find that Simon's decision not to approve charges against Wayne Anderson was entitled to absolute prosecutorial immunity, we do not decide whether the forty-eight-hour rule was applied correctly or whether jailor negligence constituted a superseding cause to his death. We review de novo the district court's grant of a 12(b)(6) motion, accepting the well-pleaded allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *See Marshall-Mosby v. Corporate Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000).

To survive a motion to dismiss a sec. 1983 action, a plaintiff must allege facts which show that the defendant, acting under color of state law, intentionally and unlawfully deprived the plaintiff of a constitutional right. *See Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir.

1990). Federal notice pleading requires only that the plaintiff "set out in her complaint a short and plain statement of the claim that will provide the defendant with fair notice of the claim." *Scott v. City of Chicago,* 195 F.3d 950, 951 (7th Cir. 1999). In ruling on a 12(b)(6) motion, a district court may take judicial notice of matters of public record without converting the 12(b)(6) motion into a motion for summary judgment. *See Henson v. CSC Credit Servs.,* 29 F.3d 280, 284 (7th Cir. 1994).

To free the judicial process from the harassment and intimidation associated with frivolous litigation, the Supreme Court has held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages." *Imbler v. Pachtman,* 424 U.S. 409, 431 (1976). However, the degree of immunity prosecutors are afforded depends on their activity in a particular case. If a prosecutor's function is judicial or quasi- judicial, he is entitled to absolute immunity from suit, but if the function was administrative or investigatory, he is only entitled to qualified immunity. *See, e.g., Spiegel v. Rabinovitz,* 121 F.3d 251, 257-58 (7th Cir. 1997). In *Spiegel,* we held that an assistant state's attorney's determination whether charges should be brought is a quasi-judicial decision, entitled to absolute immunity. Id. In that case, the assistant state's attorney was faced with cross- complaints of battery from opposing parties. He filed a report to his superiors which advocated charging one party with battery but not the other. The charged party brought a sec. 1983 malicious prosecution suit, claiming that since the assistant state's attorney acted in an investigatory role, he should not be entitled to absolute immunity for advocating that the party be charged. We disagreed, holding that

"absolute immunity must extend to the [prosecutor's] professional evaluation of evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." Id. at 257 (internal quotation and citation omitted).

In *Spiegel*, we distinguished *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993), in which the Supreme Court found a prosecutor who traveled to the crime scene to determine if evidence taken from the crime scene was sufficiently reliable to constitute probable cause was not acting as an advocate, but as an investigator. *Spiegel*, 121 F.3d at 257. In *Buckley*, the Supreme Court made clear that the determinative question in considering whether a prosecutor-defendant is entitled to absolute immunity is whether the prosecutor was acting as an advocate in performing the tasks for which he is sued. *Buckley*, 509 U.S. at 274. The Supreme Court noted that the role of advocate normally begins on arrest because "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." Id. Nonetheless, probable cause to arrest does not immunize a prosecutor for all activities performed following arrest, if these activities are investigative in nature. See id. at 274 n.5.

Felicia Anderson's complaint against Simon states that Simon "caused [Wayne Anderson] to be held in custody at a police station so that additional evidence could be gathered against him." In her response to Simon's motion to dismiss, Felicia Anderson clarified that Simon caused her husband to be held by (1) his refusal to charge Wayne Anderson, despite overwhelming evidence that he committed the crime for which he was arrested, and (2) his order that the police hold him

without being charged until a lineup could be held.

Simon's refusal to charge Wayne Anderson given the evidence at his disposal is a prosecutorial decision. In *Spiegel,* we determined that a state's attorney's decision regarding which of two cross-complaints should be prosecuted merited absolute immunity, *Spiegel,* 121 F.3d at 257, and a prosecutor's decision not to file charges immediately is entitled to the same degree of protection. Like the assistant state's attorney in *Spiegel,* Simon reviewed and weighed the evidence, and he determined that additional evidence was necessary to support a felony burglary charge. Such calculations are a necessary part of a prosecutor's role of advocate in preparing for its presentation at trial or before a grand jury, and Felicia Anderson proposes no reason that the decision to forestall charging merits less protection than the decision to charge. According to Felicia Anderson's allegations, Simon anticipated bringing charges against Wayne Anderson and was already acting in his role as an advocate when he made the decision to await the results of a lineup before proceeding with felony charging. Under these circumstances, we do not believe that Simon played an investigatory role in Anderson's detention, and on this basis, we believe that his decision not to charge is entitled to absolute immunity.

Felicia Anderson also contends that Simon caused Wayne Anderson to be held by ordering the police to keep him in custody until a lineup could be held. She claims that Simon's order that the police hold a lineup was an investigatory action, likening it to the legal advice given by prosecutors in *Burns v. Reed,* 500 U.S. 478, 493 (1991), not a prosecutorial action, so it is not entitled to the same degree of protection as his refusal to charge Wayne Anderson. Because we rule on a grant of

a motion to dismiss, we accept as fact that Simon ordered police to hold Wayne Anderson overnight and suggested that police should hold a lineup to generate additional evidence. To survive a motion to dismiss, however, Felicia Anderson must plead facts that if true, would constitute a sec. 1983 violation. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Even under this generous interpretation of Felicia Anderson's complaint, she fails to meet this threshold.

Although Felicia Anderson alleges that Simon ordered the police to hold Wayne Anderson until they conducted a lineup and suggested that the police hold a lineup to create more evidence against Wayne Anderson, Felicia Anderson does not allege that the police were under any duty to follow a state's attorney's orders or suggestions. The police, not the state's attorney's office, decide whether to detain an individual following arrest but prior to formal charging, *see, e.g., Kyle v. Patterson*, 957 F.Supp. 1031, 1034 (N.D. Ill. 1997), and the police are not obligated to adhere to the suggestions of the state's attorney's office, a separate and distinct organization with no command authority over the Chicago Police Department. For this reason, Felicia Anderson's allegations, by themselves, that Simon ordered the police to hold him and ordered the police to hold a lineup fail to state a sec. 1983 violation. Felicia Anderson additionally must allege reasons that Simon's statements caused police to hold Wayne Anderson in an unreasonable fashion. Felicia Anderson fails to meet this hurdle, as she nowhere sets forth in her complaint how Simon's orders forced police to detain Anderson.

If the police chose to hold Wayne Anderson until the state's attorney was satisfied that charges should be filed, that was a matter left to the discretion of the police.

Inaction by the police does not constitute an action by Simon that caused Wayne Anderson to be held. Because Felicia Anderson has failed to state a claim on which relief can be granted, we find no error in the district court's grant of Simon's motion to dismiss.

Because Simon's decision not to approve charges against Wayne Anderson is a prosecutorial decision rather than an investigative one, we find that he was entitled to absolute immunity from prosecution under sec. 1983 for this decision. For these reasons, we Affirm the district court's grant of Simon's motion to dismiss.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-4057

FELICIA ANDERSON, as Special Administrator
of the Estate of WAYNE ANDERSON, *Deceased*

Plaintiff-Appellant,

v.

KEVIN SIMON,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 1587 **James B. Moran,** *Judge.*

[May 17, 2000]

JUDGMENT — ORAL ARGUMENT

Honorable William J. Bauer, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorale Michael S. Kanne, Circuit Judge

The judgment of the District Court is AFFIRMED with costs in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-4057

FELICIA ANDERSON, as Special Administrator
of the Estate of WAYNE ANDERSON, *Deceased*

Plaintiff-Appellant,

v.

KEVIN SIMON,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 1587 **James B. Moran,** *Judge.*

[July 20, 2000]

ORDER

Honorable William J. Bauer, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorale Michael S. Kanne, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FELICIA ANDERSON, as Special Administrator
of the Estate of WAYNE ANDERSON, *Deceased*

Plaintiffs,

No. 99 C 1587 *v.*

KEVIN SIMON,

Defendant.

MEMORANDUM AND ORDER

Plaintiff alleges that Wayne Anderson confessed to a residential burglary and a criminal complaint was signed; that the defendant, as assistant state's attorney, had Anderson held at the police station so additional evidence could be gathered against him; that Anderson hanged himself while in custody; and that defendant thereby violated Anderson's Fourth and Fourteenth Amendment rights. Defendant moves to dismiss. We grant that motion.

Defendant complains that the complaint is too skeletal, and it is. Plaintiff fills in the details, however, from her perspective, in her responsive memorandum and we look to that in deciding the motion to dismiss. According to plaintiff Anderson was arrested for burglary at 3:40 p.m. on March 12, 1997, and immediately confessed. The recovery of stolen items corroborated the confession. He was held in the police lockup overnight because, according to the plaintiff, defendant refused to approve the filing of charges until a lineup could be held. Shortly after midnight the police watch

commander learned that Anderson was threatening suicide. He appeared in a lineup about 4:50 p.m. on March 13, [2] 1997, was returned to his cell, and was found hanging from a noose at 7:20 p.m. Plaintiff claims that defendant prevented Anderson's removal to a medical facility and thus was a cause of his death.

Even if defendant had the authority to delay transfer, which he denies, he has absolute immunity. Anderson was held for less than 48 hours, the presumptive rule-of-thumb of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and that detention was for the alleged purpose of collective more evidence before making a charging decision. Probable cause for the arrest already existed. These circumstances confer absolute immunity. *Spiegel v. Rabinovitz*, 121 F.3d 251 (7th Cir. 1997); *United States v. Daniels*, 64 F.3d 311 (7th Cir. 1995); *Hunt v. Jaglowski*, 926 F.2d 689 (1991). Further, the failure of the jailors to protect a known suicidal inmate is clearly a superseding cause. *Hibma v. Odegaard*, 769 F.2d 1147 (7th Cir. 1985). We reject the notion, implicit in plaintiff's claim that detention in a lockup rather than somewhere else necessarily increased the risk that Anderson would harm himself.

Dated: November 1, 1999

/s/ James B. Moran
Senior Judge, U.S. District Court

(2)

No. 00-635

Supreme Court, U.S.
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In The

Supreme Court of the United States

FELICIA ANDERSON, as Special Administrator of the Estate of WAYNE ANDERSON, Deceased,

Petitioner,

v.

KEVIN SIMON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prosecutor's decision not to approve charges is entitled to absolute prosecutorial immunity.

2. Whether the court of appeals properly applied the correct legal standard in its evaluation of the sufficiency of plaintiff's complaint.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 217 F.3d 472 (7th Cir. 2000). The opinion of the district court (Pet. App. 12-13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2000. On July 5, 2000, petitioner filed a petition for rehearing and suggestion for rehearing en banc which was denied on July 20, 2000. The petition for a writ of certiorari was filed on October 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner, Felicia Anderson, brought this suit on behalf of the decedent, Wayne Anderson, pursuant to 42 U.S.C. § 1983, against Kevin Simon, an Assistant Cook County State's Attorney (ASA). The court of appeals has succinctly set forth petitioner's version of events in the first three pages of its decision. (Pet. App. 1-3). In brief, petitioner asserts that Wayne Anderson confessed to a residential burglary but, when ASA Simon refused to charge him with felony burglary, he was detained overnight by the police. Wayne Anderson committed suicide in detention. *Id.*

The district court granted ASA Simon's motion to dismiss for three reasons. First, the court held that ASA Simon was entitled to absolute immunity as a prosecutor.

(Pet. App. 3-4, 13). Second, the court held that the failure of the jailors to prevent a known suicide risk was a superseding cause that absolved Simon. *Id.* Third, the court held that petitioner failed to plead a violation of Wayne Anderson's rights because he had not been held for forty-eight hours and petitioner had not pleaded sufficient complicating circumstances. *Id.*

The Court of Appeals for the Seventh Circuit affirmed. The court of appeals held that "Simon's decision not to approve charges against Wayne Anderson was entitled to absolute prosecutorial immunity." (Pet. App. 4). Because this holding resolved the case, the court explicitly stated, "we do not decide whether the forty-eight-hour rule was applied correctly or whether jailor negligence constituted a superseding cause to his death." *Id.*

ARGUMENT

I.

The court of appeals affirmed the dismissal of petitioner's complaint on the grounds that ASA Simon's decision not to approve charges against the decedent was entitled to absolute prosecutorial immunity. (Pet. App. 4). Applying the functional approach to prosecutorial immunity set forth in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the court of appeals identified the determinative question: "whether the prosecutor was acting as an advocate in performing the task for which he is sued." (Pet. App. 6, citing *Buckley*, 509 U.S. at 274, *see also* Pet. App. at 5).

The court held, "Simon's refusal to charge Wayne Anderson given the evidence at his disposal is a prosecutorial decision." (Pet App. 7). The court reasoned that calculations regarding the sufficiency and weight of evidence "are a necessary part of a prosecutor's role as advocate in preparing for its presentation at trial or before a grand jury." *Id.* Noting that the decision to prosecute clearly falls within the ambit of absolute immunity, the court found no reason that a decision *not* to charge should be entitled to any less protection. *Id.*

This determination accords with this Court's precedent as well as with the decisions of other courts of appeals that have addressed the issue. *See, e.g., Imbler,* 424 U.S. at 431, n.33 (decisions regarding "whether and when to prosecute" fall within prosecutor's role as advocate for the State and are entitled to prosecutorial immunity); *Buckley v. Fitzsimmons,* 509 U.S. at 273 ("professional evaluation of the evidence assembled by the police" is among acts prosecutor undertakes in course of role as advocate for the State and is entitled to the protections of absolute immunity); *Roe v. City and County of San Francisco,* 109 F.3d 578, 583 (9th Cir. 1997) ("[W]e hold that a prosecutor is entitled to absolute immunity for the decision not to prosecute. [Citations omitted.]"); *Harrington v. Almy,* 977 F.2d 37, 41 (1st Cir. 1992) ("[G]iven the availability of immunity for the decision *to* charge, it becomes even more important that symmetrical protection be available for the decision *not to* charge. [Emphasis in original.]"); and *Oliver v. Collins,* 904 F.2d 278, 281 (5th Cir. 1990) ("The decision to file or not file criminal charges falls within [the] category of acts [that are an integral part of the judicial process] that will not give rise to Section 1983

liability. [Citations omitted.]"). Petitioner has pointed to no decision to the contrary.

Contrary to petitioner's assertions (Pet. 3-4), the court of appeals explicitly declined to decide whether the district court correctly applied the *Gerstein* forty-eight-hour rule. (Pet. App. 4). Thus, that issue is not properly presented in this petition. Petitioner's reliance on *Kalina v. Fletcher*, 522 U.S. 118 (1997), is also misplaced. (Pet. 4). The Court did not alter its approach to prosecutorial immunity, but rather applied its functional approach to the facts of that case. *Kalina*, 522 U.S. at 130 (prosecutor's act of testifying to facts was "the function of the witness, not of the lawyer" and thus not entitled to absolute immunity). The Court in *Kalina* explicitly stated, "[w]e do not depart from our prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate." *Id.* at 131 (citing *Imbler*, 424 U.S. at 431, *Buckley*, 509 U.S. at 273).

The decision of the court of appeals is correct and was predicated upon clearly established Supreme Court precedent. This Court's review is therefore not warranted.

II.

The court of appeals applied the correct legal standard in its evaluation of petitioner's complaint. The court stated, "[w]e review de novo the district court's grant of a 12(b)(6) motion, accepting the well-pleaded allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." (Pet. App. 4). The court

then applied the following standard: "[t]o survive a motion to dismiss . . . Felicia Anderson must plead facts that if true, would constitute a sec. 1983 violation." (Pet. App. 8, citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Petitioner's assertion that the court applied a pleading standard contrary to Federal Rule of Civil Procedure 8(a)(2) is also belied by the court's own language. (Pet. 6). As the court stated, "[f]ederal notice pleading requires only that the plaintiff 'set out in her complaint a short and plain statement of the claim that will provide the defendant with fair notice of the claim.' " (Pet. App. 5 (citation omitted)). This statement is drawn directly from *Conley v. Gibson*, 355 U.S. at 47. *See also Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993) (reaffirming statement in *Conley* of notice pleading).

Finally, contrary to petitioner's assertion that the court applied a more exacting pleading standard in this case (Pet. 6), the court gave petitioner's complaint a "generous interpretation." (Pet. App. 8). It went beyond the statements made in petitioner's complaint and considered the statements made in petitioner's response to ASA Simon's motion to dismiss. (Pet. App. 6). The court concluded that "[e]ven under this *generous interpretation* of Felicia Anderson's complaint," she failed to plead facts that if true would constitute a sec. 1983 violation. (Pet. App. 8 (emphasis added)).

Petitioner raises no substantial legal issue. Rather, she disagrees with the application by the court of appeals of the correct legal standard to her statement of her claim in this case. Petitioner's fact-bound objections to the

appellate court's decision do not merit this Court's review.[1]

III.

Finally, there are two alternative grounds that support the dismissal of petitioner's complaint. First, the district court held that the police department's failure to prevent a known suicide risk was a superseding cause. (Pet. App. 13). Second, the district court held that Wayne Anderson had not been held for forty-eight hours and that petitioner had not pleaded sufficient complicating circumstances to allege a violation of Wayne Anderson's Fourth Amendment right to a prompt judicial determination of probable cause. *Id.* The court of appeals explicitly stated that it did not consider either of these grounds because its absolute immunity holding resolved the case. (Pet. App. 4). Because the district court's dismissal of petitioner's complaint could be affirmed on either of these alternative grounds, this case does not lend itself to review by this Court.

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[1] This case involves no allegation of First Amendment retaliation. *See* Pet. App. 1-3. Thus, the cases petitioner cites regarding the elements of a retaliation claim are inapposite. (Pet. 5, n.1).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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